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The Inadequacy of the Citizen Submission Process of Articles 14 & (and) 15 of the North American Agreement on Environmental Cooperation

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I. INTRODUCTION

The North American Agreement on Environmental Cooperation (NAAEC)[1] had the potential to transform the trade and environment debate when the governments of Canada, Mexico, and the United States made citizen participation in environmental law development and enforcement a central component of regional trade issues. The NAAEC's focus on regional trade issues and citizen participation derives from environmentalists' opposition to the North American Free Trade Agreement (NAFTA), which they believed would encourage member governments to relax enforcement of environmental laws or weaken environmental laws to attract industry. The NAAEC's Preamble announces "the importance of public participation in conserving,

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+ IELP Law Clerks. IELP is the international environmental law clinic at Lewis & Clark Law School in which students work on a range of international environmental issues. For a representative sample of projects that students have worked on, see http://www.lclark.edu/org/ielp/. Deborah Scott, J.D. expected 2005, presented some of the ideas in this article at the public meeting organized by the Joint Public Advisory Committee on Oct. 2, 2003 in Montreal.

1. North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

protecting and enhancing the environment."[2] Article 1 of the NAAEC elevates the promotion of transparency and public participation in the development of environmental law to a primary objective of the NAAEC. It also calls on the parties to the NAAEC to strengthen cooperation, to develop and improve environmental practices, and to enhance compliance with and enforcement of environmental law.[3]

The NAAEC establishes the Citizen Submission Process of Articles 14 and 15 as the linchpin of the nexus between citizen participation, environmental enforcement, and trade. Through Articles 14 and 15, citizens may present submissions to the Secretariat of the Council for Environmental Cooperation (CEC) alleging failures of a government to enforce environmental law. This innovative mechanism provides a valuable opportunity for North Americans to address enforcement issues in the context of regional free trade. The Citizen Submission Process is widely regarded as the most innovative and closely-watched aspect of the NAFTA environmental side agreement.[4] Many had regarded the Citizen Submission Process as a potential model for accountability and governance for a new breed of international institutions—a positive response to globalization that gives citizens a voice in the often impenetrable affairs of international organizations.[5] Citizens had strongly supported the Citizen Submission Process and played an active role in supporting and employing the mechanism.[6] The CEC's Joint Public Advisory Committee (JPAC) designed the Citizen Submissions to "play a unique—and indispensable—role in fostering

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2. *Id.* pmbl., at 1482.

3. *Id.* art. 1, at 1483.

4. *See, e.g.,* John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation, in* GREENING THE NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 1 (David L. Markell & John H. Knox, eds. 2003).

5. INTERNATIONAL ENVIRONMENTAL LAW PROJECT, COMMENTS ON ISSUES RELATING TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION 1 (Oct. 2, 2003), *available at* http://www.lclark.edu/org/ielp/objects/IELP comments_en.pdf.

6. For example, the International Environmental Law Project (IELP) drafted the Migratory Bird Submission with the Center for International Environmental Law on behalf of the nine groups signing on to that submission. Alliance for the Wild Rockies, et al., Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, Migratory Birds, A14/SEM-99-002/01/SUB (Nov. 17, 1999) (SEM 99-002), *available at* http://www.lclark.edu/org/ielp/cec.html [hereinafter Migratory Birds - Submission].

the vigorous environmental enforcement that is a necessary component of expanded free trade under NAFTA."[7]

This early support, however, has waned considerably as the decisions of the CEC's Council, comprising the top environmental officials of the three member States, have eroded public confidence in the process.[8] The Council has marginalized the Secretariat's independence by narrowing the scope of submissions, a role designated to the Secretariat. In addition, it has ignored the JPAC's advice on implementation of the submission process.[9] Moreover, the member governments have chosen to treat the Citizen Submission Process as adversarial, rather than cooperative. For example, the United States has frustrated efforts of citizens' groups to promote enforcement of environmental law, mischaracterized allegations made by citizens' groups, and failed to heed any suggestions for improving enforcement included in submissions or factual records.[10]

Although the Council's decisions have been widely criticized,[11] the Council has taken no notice of this criticism. The Council appears unwilling to allow the submission process to mature and flourish. The JPAC has made repeated, and increasingly exasperated, attempts to convince the Council that the submission process needs breathing room to develop to its widely desired potential. Citizens' groups that sought to use the Citizen Submission Process in a balanced and fair way to examine government conduct are simply turning away from the process until the Council pledges to respect the roles and boundaries clearly articulated in the NAAEC. The JPAC recently excoriated the Council for intervening inappropriately in the Citizen Submission Process,[12]

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7. JOINT PUBLIC ADVISORY COMMITTEE [JPAC], COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA [CEC], LESSONS LEARNED: CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, FINAL REPORT TO THE COUNCIL OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION (June 6, 2001), http://www.cec.org/files/pdf/JPAC/rep11-e-final_EN.PDF.

8. *See* Letter from Randy L. Christensen, Sierra Legal Defense Fund, to CEC Council (Mar. 6, 2002), *available at* http://www.cec.org/files/pdf/JPAC/Sierra_to_Council-BCMining.pdf (stating that the Council's actions could "threaten to strip the citizen submission process of its integrity, utility and legitimacy").

9. The Joint Public Advisory Committee (JPAC) "may provide advice to the Council on any matter within the scope of this agreement . . . and on the implementation and further elaboration of this agreement, and may perform such other functions as the Council may direct." NAAEC, *supra* note 1, art. 16(4), at 1489.

10. *See infra* Section III(C).

11. *See e.g.*, INTERNATIONAL ENVIRONMENTAL LAW PROJECT, *supra* note 5; Letter from Christensen, *supra* note 8.

12. JPAC, CEC, Advice to Council 03-05 (Dec. 17, 2003), http://www.cec.org/files/PDF/JPAC/Advice03-05_EN.pdf [hereinafter JPAC, Advice to Council 03-05].

hopefully representing the low point, rather than the end point, for citizen participation in trade agreements.

This Article assesses the environmental and institutional consequences of the Council's efforts to undermine the Citizen Submission Process. Part II provides the background on the Citizen Submission Process to the NAAEC. Part III discusses the environmental results from the Citizen Submission Process by comparing the role of the Secretariat, the Council, and the United States. In particular, it analyzes how the efforts of the Council and the United States have seriously inhibited the Citizen Submission Process from achieving more positive environmental results and deeply undermined the Secretariat and the JPAC. Consequently, support for the Citizen Submission Process in the United States is very low. Part IV analyzes the negative impacts of the Council's actions. Part V concludes with suggestions for improving the Citizen Submission Process through the implementation of a number of recommendations to restore public confidence in the Citizen Submission Process and reaffirm the process's unique character as a bridge between environment and trade.

II. THE CITIZEN SUBMISSION PROCESS

The NAAEC allows nongovernmental organizations (NGOs) and individuals to file submissions with the Secretariat alleging that Canada, Mexico, or the United States "is failing to effectively enforce its environmental law."[13] The submitter must provide sufficient information to allow the Secretariat to review the submission, demonstrate that it has communicated in writing with the relevant authorities concerning the matter of the petition, indicate the party's response, if any, and meet other basic eligibility requirements.[14] The Secretariat has discretion to reject submissions that fail to meet any of these requirements. The submitter has no mechanism to appeal the Secretariat's decision.

If the Secretariat determines that the submission meets these Article 14(1) criteria, it then has discretion to request a response to the submission from the party "against" whom the submission is directed. If the Secretariat believes that a response is unnecessary, the matter is closed; the submitter cannot appeal this decision either. In deciding

13. NAAEC, *supra* note 1, art. 14(1), at 1488.

14. *Id.* The submitter must, among other things, also write the submission in the language specified by that Party, clearly identify the organization or person submitting the petition, and aim the submission at enforcement, and not at harassment of industry. *Id.*

whether a party should prepare a response, the Secretariat considers whether the submission alleges harm to the person or organization making the submission; whether the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the NAAEC; whether private remedies available under the party's law have been pursued; and whether the submission is drawn exclusively from mass media reports.[15]

If the Secretariat determines that a response from the "defendant" party is necessary, the party has thirty days to respond.[16] If the party chooses to respond, it should state whether the matter is or was the subject of pending judicial or administrative proceedings, and whether private remedies are available.[17] If a pending judicial or administrative proceeding is "pursued by the Party,"[18] meaning the NAFTA party whose enforcement policies are being challenged, then the Secretariat may "proceed no further."[19] Nevertheless, the Secretariat has refused to recommend the development of a factual record even where the pending proceeding was initiated by someone other than a party to avoid interfering or duplicating efforts.[20]

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15. NAAEC, *supra* note 1, art. 14(2), at 1488. In one of the first Article 14 petitions, the Secretariat concluded that the burden to show harm is substantially less for Article 14 petitions than for civil actions in many countries. Mexico, the responding Party, argued that submitters did not adequately allege harm to the members of their organizations. Nonetheless, the Secretariat ruled that the submitters met their burden:

> In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise corral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.

Recommendation of the Secretariat to Council for the Development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation at 5, Cozumel, A14/SEM/96-001/07/ADV (CEC June 7, 1996) (SEM 96-001), *available at* http://www.cec.org/files/pdf/sem/96-1-ADV-E.pdf.

16. NAAEC, *supra* note 1, art. 14(3), at 1488.

17. *Id.*

18. *Id.* art. 45(3).

19. Council Res. 99-06, CEC, C/99-00/RES/07/Rev.3, para. 9.4 (June 29, 2001), http://www.cec.org/files/PDF/COUNCIL/99-06e_EN.pdf.

20. *See* Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation, Oldman River I, A14/SEM/96-003/12/15(1) (Apr. 2, 1997) (SEM 96-003), *available at* http://www.cec.org/files/pdf/sem/96-3-DET-OE3.pdf [hereinafter Oldman River I—Article 15(1) Determination]. When the plaintiffs in the judicial case abandoned the judicial proceedings, the submitters of the Article 14 submission re-petitioned to the Secretariat a year later. The Friends of the Oldman River, North American Agreement on Environmental Cooperation Article 14 Submission, Oldman River, A14/SEM-97-006/01/SUB (Oct. 4, 1997)

Similarly, the NAAEC does not explicitly require a submitter to first pursue private remedies before a petition might be accepted for purposes of Article 14; it is merely something about which the defending party may advise the Secretariat. The Secretariat has refused to consider a submission because the submitters had not "diligently pursu[ed] local remedies between the time of the government's adoption and implementation of [the law] and the date the submission was filed."[21]

The Secretariat has discretion to request authorization from the Council to prepare a factual record upon receiving a response from the defending party.[22] Again, the Secretariat may determine that the response is sufficient and end the matter with no chance for the submitter to appeal. If the Secretariat recommends to the Council that a factual record is warranted, the Council must approve the Secretariat's recommendation by a two-thirds vote.[23] If the Council approves the recommendation to develop a factual record, the Secretariat may

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(SEM 97-006), *available at* http://www.cec.org/files/pdf/sem/97-6-SUB-E.pdf. After reviewing the new submission, the Secretariat determined that a response from the Party was warranted. Article 15(1) Notification to Council that Development of a Factual Record is Warranted, Oldman River II, A14/SEM-97-006/15/ADV (July 19, 1999) (SEM 97-006), http://www.cec.org/files/pdf/sem/97-6-ADV-E.pdf. The Secretariat has similarly declined to recommend a factual record where criminal investigations were pending, even though it found that such investigations do not meet the definition of "pending judicial or administrative proceeding." In *Cytrar II*, however, the Secretariat rejected Mexico's claim that a pending international arbitration precluded the Secretariat from moving forward, because it found that the subject matter of the arbitration was not the same as the Article 14 submission. Article 15(1) Notification to Council that Development of a Factual Record is Warranted, Cytrar II, A14/SEM/01-001/41/ADV (July 29, 2002) (SEM 01-001), *available at* http://www.cec.org/files/pdf/sem/01-1-ADV-E.pdf.

21. Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation at 3, Canadian Environmental Defence Fund, A14/SEM/97-004/03/14(1) (May 26, 1997) (SEM 97-004), *available at* http://www.cec.org/files/pdf/sem/97-4-DET-E.pdf. In *BC-Mining*, the Secretariat undertook an exhaustive analysis of whether submitters had pursued private remedies. Article 15(1) Notification to Council that Development of a Factual Record is Warranted, BC-Mining, A14/SEM-98-004/15/ADV (May 11, 2001) (SEM-98-004), *available at* http://www.cec.org/files/pdf/sem/ACF11.PDF. After a consideration of private remedies pursued by other organizations, the greater enforcement remedies available to the government, and the experience of seeing private prosecutions taken over by the government and then dismissed, the Secretariat recommended the preparation of a factual record. *Id.* at 26. The Secretariat also allowed a submission to move forward based on the claim of submitters that "[t]here are no realistic private remedies available and such avenues for redress that may be available have been pursued by Submitters and others without success." Determination in Accordance with Articles 14(1) and 14(2) of the North American Agreement on Environmental Cooperation, Ontario Power Generation at 8, A14/SEM/03-001/22/14(1)(2) (Sept. 19, 2003) (SEM 03-001), *available at* http://www.cec.org/files/pdf/sem/03-1-DET%2014_1__2__en.pdf.

22. NAAEC, *supra* note 1, art. 15(1), at 1488.

23. *Id.* art. 15(2), at 1488.

consider information that is publicly available or information submitted to it by interested persons, NGOs or the JPAC.[24] The Secretariat does not have the authority, however, to subpoena documents.[25]

III. THE ENVIRONMENTAL RESULTS OF THE CITIZEN SUBMISSION PROCESS

Whether the Citizen Submission Process results in environmental benefits cannot solely be judged on whether the member governments improve enforcement when confronted with a submission alleging a failure to enforce environmental laws effectively. While that certainly is an important element of the process's success or failure, the success of the process can also be viewed in light of the success of the institutions formed to implement it. In the institutional sense, the Citizen Submission Process has succeeded; the Secretariat has established itself as a highly professional institution that carefully interprets the NAAEC in a way that promotes the NAAEC's objectives. On the other hand, the Citizen Submission Process has had fewer concrete environmental achievements, largely because of obstruction of the process by the Council or by the parties acting alone.

A. The Role of the Secretariat

Scholars, NAAEC review committees, and members of the public are virtually unanimous in applauding the Secretariat's rigorous review of submissions for eligibility and for determination on whether a factual record is warranted.[26] With respect to eligibility, the Secretariat has

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24. *Id.* art. 15(4), at 1488.

25. The Secretariat must submit a draft factual record to the Council. Any party has forty-five days to comment on the accuracy of the draft. Neither the Council nor the Secretariat is under an obligation to make the draft public, and the NAAEC does not expressly grant interested persons or NGOs the right to comment on the draft. The Secretariat must incorporate any comments of the Parties in the final factual record and submit it to the Council. The Council, by a two-thirds vote, may make public the factual record. *Id.* art. 15(5), (6), at 1489.

26. *Accord* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L. Q. 1, 96-97 (2001) (stating "The Secretariat has not shown any particular deference to states' suggested interpretations of the [NAAEC] Agreement. Conversely, it has dismissed submissions—even by major environmental groups—that did not meet the requirements for admissibility. In short, the Secretariat's decisions appear to be consistently grounded on carefully reasoned legal interpretations of the [NAAEC] Agreement rather than on fear of adverse reactions by, or the desire to carry favor with, either states or submitters."). In addition, a review of the Independent Review Committee concluded that: "[t]he record on the submissions that have been subject to Secretariat decisions to date appears to show a consistent and well reasoned group of decisions. While observers (and the Parties) may, and some certainly have, criticized specific

denied submissions that clearly fail to meet the requirements of Articles 14 and 15 and it has accepted those that clearly meet such requirements. Where the submission required interpretation of Article 14, the Secretariat has provided thoughtful legal analysis to support its position. With respect to whether a factual record is warranted, the Secretariat's actions have also been exemplary. For example, in *Migratory Birds*, in which the submitters alleged that the United States was failing to enforce the Migratory Bird Treaty Act (MBTA) against loggers, the Secretariat carefully reviewed the U.S. response and determined that the preparation of a factual record was warranted. In its determination, the Secretariat made several significant findings of first impression, including whether the U.S. failure to enforce the MBTA resulted from a reasonable exercise of prosecutorial discretion or from bona fide decisions to allocate resources to the enforcement of other environmental matters.[27] The Secretariat, however, has also found that five submissions, while meeting eligibility requirements under Article 14, did not warrant development of a factual record.[28] The Secretariat has been consistently evenhanded in its decisions, and has shown no bias toward or against submitters or governments.[29]

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decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation." CEC, FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE § 3.3.3 (1998).

27. Article 15(1) Notification to Council that Development of a Factual Record is Warranted, Migratory Birds, A14/SEM/99-002/11/ADV (Dec. 15, 2000) (SEM 99-002), *available at* http://www.cec.org/files/pdf/sem/ACFA30.pdf [hereinafter Migratory Birds—Notification to Council].

28. Under guideline 9.6 the process was terminated by the Secretariat so there is no factual record. *See* Oldman River I—Article 15(1) Determination, *supra* note 20; Determinación del Secretariado en conformidad con el artículo 15(1) del Acuerdo de Cooperación Ambiental de América del Norte, Lago de Chapala, A14/SEM/97-007/16/15(1) (July 14, 2000) (SEM 97-007), *available at* http://www.cec.org/files/pdf/sem/ACFA4D.pdf; Determinación del Secretariado en conformidad con el artículo 15(1) del Acuerdo de Cooperación Ambiental de América del Norte, Cytrar I, A14/SEM/98-005/27/15(1) (Oct. 26, 2000) (SEM 98-005), *available at* http://www.cec.org/files/pdf/sem/ACFBDF.pdf; Secretariat Determination under Article 15(1) that Development of a Factual Record is Not Warranted, Great Lakes, A14/SEM/98-003/24/15(1) (Oct. 5, 2001) (SEM 98-003), *available at* http://www.cec.org/files/pdf/sem/98-3-DET-E3.pdf; Determinación del Secretariado en conformidad con el artículo 15(1) del Acuerdo de Cooperación Ambiental de América del Norte, Aeropuerto de la Ciudad de México, A14/SEM/02-002/27/15(1) (Sept. 25, 2002) (SEM 02-002), *available at* http://www.cec.org/files/pdf/sem/02-2-DET-2-S.pdf.

29. For example, many environmental groups opposed the Secretariat's interpretation of "environmental law" when it ruled that a legislative act repealing the applicability of environmental laws for logging projects did not constitute an "environmental law" within the meaning of Article 45 of the NAAEC. *See, e.g.*, Article 14(2) Determination, Spotted Owl, A14/SEM/95-001/04/14(2) (Sept. 21, 1995) (SEM 95-001), *available at* http://www.cec.org/

In sum, the Secretariat has fulfilled its role in the process in a competent and professional manner. Its decisions and legal interpretations are rigorous, not capricious.[30] As a result, the Secretariat has been instrumental in ensuring the integrity of the Citizen Submission Process.[31] Consequently, the institutional framework exists within the CEC for achieving environmental benefits from the Citizen Submission Process.

B. The Role of the Council

In contrast to the positive role of the Secretariat, the Council has adversely affected the ability of the Citizen Submission Process to achieve better environmental results. The Council has degraded the process through three principal means: (1) disallowing examinations of allegations of a broad pattern of ineffective enforcement, (2) limiting the scope of factual records, and (3) questioning the sufficiency of information. Because the Council members have acted in their role as parties, these criticisms also bear on whether an affected party is meeting its obligations under the Citizen Submission Process.

1. Disallowing Investigations Into Broad Patterns of Nonenforcement

Submitters quickly recognized that the process was especially useful when examining a broader pattern of government conduct which, if not adequately justified or explained, might reveal a systematic failure to enforce environmental law.[32] This is especially true in the United States where the Supreme Court has ruled that an agency's decision not to take enforcement action with respect to a specific case is "presumed immune from judicial review."[33] Moreover, while microscoping in on

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files/pdf/sem/95-1-DET-E1.PDF; Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation, Logging Rider, A14/SEM/ 95-002/03/14(1) (Dec. 8, 1995) (SEM 95-002), *available at* http://www.cec.org/files/pdf/sem/95-2-DET-OE.pdf. As John Knox concludes, "There is room for reasonable minds to disagree on the correct legal outcome of the first two submissions, since the Agreement does not clearly address the issues involved. The key point, however, is that the Secretariat reached a plausible, principled interpretation." Knox, *supra* note 26, at 102 n.439.

30. *Accord* David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process,* 12 GEO. INT'L ENVTL. L. REV. 545, 566-67 (2000).

31. *See id.* at 564-66 (describing further details on the decisions of the Secretariat). On a more personal level, members of the Secretariat have always found time to answer questions with respect to the Citizen Submission Process, whether of a substantive or procedural matter. That is true whether those members were responding to questions directly relating to the *Migratory Birds* submission, other submissions, or the submission process in general.

32. *Accord* Markell, *supra* note 30, at 558.

33. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

isolated, fact-specific cases occasionally might be appropriate, broader patterns of conduct are more likely to elevate the concerns to a regional level. This directly advances the NAAEC's goals and objectives, including the effective enforcement of environmental law in North America. Investigations of broad patterns of nonenforcement would also allow the Citizen Submission Process to yield greater environmental results, because widespread enforcement failures would almost certainly levy an important environmental toll. Shining a spotlight on systematic enforcement deficiencies through the Citizen Submission Process would help ensure that NAFTA countries uphold their part of the cooperative bargain not to reduce environmental enforcement due to competitive pressures.

The Secretariat has consistently provided clear and well-reasoned analysis of the so-called "pattern" issue. The Secretariat has stated in compelling terms how these broader claims were consistent with, and furthered the goals of, the NAAEC.[34] Narrow, highly specific fact patterns often shift the focus from government conduct to the acts or omissions of a single industry, business, or other entity. Single events may also mask the aggregate effects of policies or practices. Moreover, they are much more easily defended by asserting enforcement discretion, a defense that should be exceedingly difficult to claim for widespread patterns of nonenforcement.

Nonetheless, it has become abundantly clear that the Council is uncomfortable defending government enforcement practices and policies and would rather mount highly technical and legal defenses to specific, isolated cases. The Council demonstrated its hostility to the pattern issue by first attempting to quietly renegotiate the Guidelines on Enforcement Matters (Guidelines),[35] an approach that was halted by strong JPAC and public opposition at the June 2000 Council meeting in Dallas, Texas. In response to JPAC and public concerns expressed at that meeting, Council Resolution 00-09 established the JPAC-led

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34. For example, the Secretariat stated in *Migratory Birds*:

> In other words, the larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC.

Migratory Birds—Notification to Council, *supra* note 27, at 10.

35. Council Res. 99-06, CEC, C/99-00/RES/07/Rev.3 (June 29, 2001), http://www.cec.org/files/PDF/COUNCIL/99-06e_EN.pdf.

process for addressing concerns about the implementation of the Citizen Submission Process. The Council, however, soon found it could attack the pattern issue and circumvent the JPAC consultation process by simply reshaping the scope of factual records when deciding whether to instruct the Secretariat to prepare a factual record. Most recently, the Council has developed a new line of attack—questioning the "sufficiency" of the information upon which the submission is based.[36]

2. Impermissibly Narrowing the Scope of Factual Records

The Council's actions to narrow the scope of factual records and interpret provisions of the NAAEC clearly within the purview of the Secretariat are not only troubling, but also *ultra vires,* beyond its authority granted by the NAAEC.[37] The Council's actions have eroded support for the NAAEC[38] as well as for the use of provisions similar to the process established by Articles 14 and 15 in other free trade agreements.[39] The Council's refusal to respect the boundaries delineated in the NAAEC has led to repeated calls from the JPAC, the National Advisory Committee (NAC), and independent review committees for the Council to step back and allow the process to operate independently, as intended. For example, the U.S. Governmental Advisory Committee recently declared that the Council's decisions to narrow the scope of factual records had "eviscerate[d]" the autonomy of the Secretariat to define the scope of the factual record.[40] The JPAC has raised similar concerns, even charging the Council with narrowing factual records and taking other action on a case-by-case basis—through its vote of the

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36. *See* Council Res. 03-05, CEC, C/C.01/03-02/RES/05/final (Apr. 22, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-Ontario-Logging_en.pdf.

37. David L. Markell, *The CEC Submission Process: On or Off Course?, in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 274, 284-85 (David L. Markell & John H. Knox, eds. 2003).

38. The Sierra Legal Defense Fund, in a letter to the Council, stated that the Council "fails to respect the independence of the CEC Secretariat" and that the Council's Resolution 01-11 "threatens to strip the citizen submission process of its integrity, utility and legitimacy." Letter from Randy L. Christensen, *supra* note 8. Also, the Center for International Environmental Law wrote to JPAC that the Council's narrowing of the Migratory Bird Submission "limit[s] the utility of the citizen submission process." Letter from Stephen Porter, Senior Attorney, Center for International Environmental Law to JPAC (Oct. 17, 2001) (on file with the Loyola of Los Angeles International & Comparative Law Review).

39. For example, a citizen submission process was not included in the recent U.S.-Chile free trade agreement.

40. Letter from Denise Ferguson-Southard, Chair of the Governmental Advisory Committee the U.S. Representative to the CEC, to Christine Whitman, Administrator of the U.S. Environmental Protection Agency (Oct. 19, 2001) (on file with the Loyola of Los Angeles International & Comparative Law Review).

Secretariat's recommendation of a factual record—as a means of circumventing the JPAC-led public consultation procedure for considering revisions to the Article 14 and 15 Submission Guidelines.[41]

The NAAEC carefully establishes a system of "checks and balances" by granting the Council and Secretariat distinct roles and clear boundaries. In this case, the Secretariat has the duty to decide the scope of the factual record. By its own terms, Article 15 of the NAAEC confers to the Council the power to approve or reject the Secretariat's recommendation to prepare a factual record. Although the Council has the duty to "oversee" the Secretariat,[42] that is far different from ignoring or overturning the Secretariat's NAAEC-mandated Article 14 and 15 duties. By substituting its own judgment of what constitutes "sufficient information" and the appropriate scope of a factual record, the Council denies the Secretariat its proper role established by the NAAEC. In so doing, the Council further undermines public confidence that it will allow the process to operate as designed, even if that occasionally shines an embarrassing spotlight on government conduct. If citizens perceive the process as rigged and refuse to use it, then the process cannot provide beneficial environmental results.

Narrowing the scope of factual records beyond the Secretariat's specific recommendations has already radically altered the balance between Secretariat and Council functions. Without question, the submitters would never have prepared *Migratory Birds* if they had known that the Council would, in an arbitrary and unexplained fashion, limit the record to two specific instances cited only as examples of widespread government nonenforcement. The *Migratory Birds* submitters found the Citizen Submission Process attractive *only* because of its capacity to investigate the United States's broad pattern of nonenforcement of the MBTA.[43] Moreover, it is highly doubtful that the

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41. *See, e.g.*, JPAC, CEC, Advice to Council 01-07, J/01-03/ADV/01-07/Rev. 3 (Oct. 23, 2001), http://www.cec.org/files/pdf/JPAC/01-07E.pdf ("[JPAC] is compelled to express its frustration at being forced once again to advise on issues related to Articles 14 and 15, because past-agreed upon procedures are being ignored or circumvented."); JPAC, CEC, Advice to Council, 02-03 J/02-01/ADV/02-03/Rev.1 (Mar. 8, 2002), http://www.cec.org/files/pdf/JPAC/02-03E.pdf (stating Council's narrowing actions are "effectively eliminating an opportunity for public input into this very important issue; and . . . is considered by JPAC as a *de facto* change to the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC*").

42. NAAEC, *supra* note 1, art. 10(1)(c), at 1485.

43. Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-712 (2000). The MBTA implements four international treaties, including agreements with Canada and Mexico, aimed at protecting migratory birds. Section 703 of the MBTA prohibits any person from killing or "taking" migratory birds, including the destruction of nests, the crushing of eggs, and the killing

Secretariat would have recommended the development of a factual record to the Council if the Secretariat had known that the scope of the submission would be narrowed in this manner.[44] The absurdity of the result is patent: the Council directed the Secretariat to develop a factual record in *Migratory Birds* that resembled neither the issues presented by the submitters nor those recommended for study by the Secretariat. Indeed, it is the factual record that nobody wanted.

The Council's decision to narrow the scope of the factual record prevented the Secretariat from obtaining exactly the type of information submitters sought in order to achieve positive environmental results from the process.[45] As reported in the factual record, the Council's decision precluded the Secretariat from investigating and obtaining a

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of nestlings and fledglings, "by any means or in any manner," unless the U.S. Fish and Wildlife Service (FWS) issues a valid permit. The United States has never prosecuted a logger or logging company for a violation of the MBTA, even though it acknowledges that the MBTA has consistently been violated by persons logging on federal and non-federal land. In fact, the Director of the FWS has stated that the FWS, the agency responsible for enforcement of the MBTA, "has had a longstanding, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations, that result in the taking of non-endangered, non-threatened, migratory birds and/or their nests." Memorandum from U.S. Fish and Wildlife Service, to Service Enforcement Officers, MBTA Enforcement Policy (Mar. 7, 1996), *available at* http://www.cec.org.

44. For example, if the *Migratory Birds* Submission only related to the two California nonenforcement examples that became the focus of the factual record, the Secretariat may have answered several key eligibility requirements differently and decided to reject the Submission. Questions relating to the pursuit of private remedies, harassment of industry, or reasonable use of prosecutorial discretion may all have different answers depending on whether submitters allege general nonenforcement behavior or nonenforcement in a specific instance. As a result, the Secretariat may have determined that such a submission did not warrant a factual record. The Secretariat implied such a result in the context of the narrowed scope of *Oldman River II*: "It should not be assumed that the Secretariat Article 15(1) Notification to Council recommending a factual record for [Oldman River II] was intended to include a recommendation to prepare a factual record of the scope set out [in the Council's limiting Resolution], or that the Secretariat would have recommended a factual record of this scope." Factual Record at 90, Oldman River II (CEC Aug. 11, 2003) (SEM-97-006), *available at* http://www.cec.org/files/pdf/sem/97-6-FFR_en.pdf.

45. The Council has narrowed the factual record of other submissions. *See* Final Factual Record at 23, BC Logging, (CEC Aug. 11, 2003) (SEM-00-04), *available at* http://www.cec.org/files/pdf/sem/00-4-FFR_en.pdf (excluding information regarding Canada's enforcement of the *Fisheries Act* against logging operations). *See also* Final Factual Record at 18-19, (CEC Aug. 12, 2003) (SEM-98-004), *available at* http://www.cec.org/files/pdf/sem/98-4-FFR_en.pdf (excluding information regarding the lack of enforcement of the *Fisheries Act* in regards to mining operations in British Columbia); Final Factual Record at 17-18, (CEC Aug. 11, 2003) (SEM-97-006), *available at* http://www.cec.org/files/pdf/sem/97-6-FFR_en.pdf (excluding prosecutions as a tool for enforcement of the Fisheries Act and the basis for Canada's assertion that voluntary compliance of the Fisheries Act represents legitimate use of discretion of enforcement powers).

vast amount of information that would have proved extraordinarily valuable:

- Information regarding the effectiveness nationwide of the "non-enforcement" initiatives, such as population monitoring and public outreach, described in the US response [as effective alternatives to MBTA enforcement, in the absence of enforcement against logging operations].

- Information regarding the number of migratory birds taken (as defined in the MBTA) as a result of logging in the United States and a comparison of that number to the number of birds taken as a result of other activities described in the United States response as to which the United States has taken enforcement action or has established a permit program under the MBTA.

- Information regarding the effect nationwide of limiting the MBTA permit program to activities involving the intentional killing of migratory birds, including information regarding the effect that a permit program for logging would have in reducing bird deaths due to logging, and regarding the assertion that difficulties in monitoring compliance would undermine the utility of an MBTA permit program for logging, both in general terms and in comparison to hunting and other activities for which the FWS issues MBTA permits.

- Information regarding whether, as a general matter, it is easier to require or encourage the use of best practices to reduce takes of migratory birds in contexts other than logging, and whether the use of such best practices in other contexts is likely to be more effective than in the logging context.

- Information regarding the assertion that, as a general matter, it is more effective to leverage enforcement resources to achieve greater levels of compliance for activities other than logging than it is for logging.

- Information regarding whether the US practice to date of only pursuing enforcement action under the ESA in connection with threatened or endangered migratory birds killed or taken as a result of logging activity is an effective means of achieving the goals of the MBTA.

- Information regarding the other examples included in the submission to illustrate the Submitters' enforcement concerns, in particular the four specific timber sales in Georgia that the Submitters estimated would destroy an estimated 666 nests containing migratory bird eggs or fledglings and the seven specific timber sales in Arkansas that the Submitters asserted would result in the death of an estimated 9,000 migratory songbirds.[46]

We have spent considerable space outlining the types of information excluded because submitters in *Migratory Birds* view the information obtained through the factual record as unhelpful to the overall process of remedying a nationwide failure to enforce the MBTA. Quite clearly, the submitters believe that the scale of nonenforcement harms migratory birds tremendously. The environmental and enforcement benefits that would have flowed from a factual record that included the information listed above would far exceed the benefits obtained from the factual record resulting from the Council's decision to narrow the scope of the *Migratory Birds* submission.

The ad hoc nature of the Council's decision-making creates great uncertainty for both the Secretariat and submitters. Without clear rules, neither the Secretariat nor submitters know whether Council decisions constitute precedent or whether the Council will establish a different rule in future cases. Even if we accept that the Council can override decisions of the Secretariat,[47] a system must have clear rules that establish boundaries and definitions, providing expectations for all the participants. Articles 14 and 15 of the NAAEC establish those clear rules: the Council votes either "yes" or "no" on whether to instruct the Secretariat to prepare a factual record on the issues the Secretariat recommends for further study.

3. Questioning the Sufficiency of Information

The Council recently opened a new line of attack on the pattern issue by deciding in *Ontario Logging* that the submission did not contain sufficient information to warrant the development of a factual

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46. Final Factual Record at 21-22, Migratory Birds, (CEC Apr. 22, 2003) (SEM-99-002), *available at* http://www.cec.org/files/pdf/sem/MigratoryBirds-FFR_EN.pdf, [hereinafter Final Factual Record for Migratory Birds].

47. *See* ENVIRONMENTAL LAW INSTITUTE, FINAL REPORT: ISSUES RELATED TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 23-25 (2003) [hereinafter ELI REPORT], http://www.cec.org/files/pdf/JPAC/ELI-Art14-15-Report-Final-5_en.pdf (providing opposing views on the authority of the Council).

record.[48] The Council's strategy may entirely derail environmental benefits of the Citizen Submission Process, because it has the effect of rejecting the entire submission rather than just narrowing it.

Article 14 explicitly states that the Secretariat alone has authority to determine whether a submission provides sufficient information. It unambiguously commands that "[t]he Secretariat may consider a submission . . . if *the Secretariat* finds that the submission . . . provides sufficient information to allow *the Secretariat* to review the submission . . . ."[49]

Instead of simply terminating the *Ontario Logging* submission through a vote, the Council impermissibly remanded the submission to submitters, presumably to supplement it with information the Council deemed sufficient. While innocent in form, this approach actually usurps the Secretariat's function of reviewing the sufficiency of submissions by laying out markers the Secretariat must presumably follow in its reconsideration of the matter.[50] In other words, the Council appears to be signaling to the Secretariat that it expects the sufficiency element to be applied in a more restrictive and limiting way. Faced with a Secretariat that refuses to adopt a cramped definition of sufficiency, the Council may attempt to simply revise the Guidelines, defining sufficiency in a way that shuts down efforts to examine patterns of government conduct.

Following this path will lead to the virtual extinction of the Citizen Submission Process because it will terminate its most useful applications. If we assume that the Council has banned allegations of widespread patterns of nonenforcement, then submitters must overcome the Council's ban by compiling a long list of specific violations tied to a single nonenforcement policy. Yet, once submitters compile that list, which may tax their limited resources, the Council may simply reject the submission as containing insufficient information.

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48. Council Res. 03-05, CEC, C/C.01/03-02/RES/05/final (Apr. 22, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-Ontario-Logging_en.pdf. The Council questioned the sufficiency with the use of a statistical model which submitters contend provides the best available information precisely because the government of Canada has abdicated its enforcement responsibilities by, among other things, failing to collect the kind of information required to assess the impact of commercial logging on bird populations protected by the Migratory Bird Treaty Act.

49. NAAEC, *supra* note 1, art.14(1), at 1488 (emphasis added).

50. The Secretariat promptly found that the new Submission, which continues to employ the statistical model objected to by Canada, met the sufficiency threshold and the Secretariat requested a response from Canada.

C. The Role of the Party: The United States

If the actions of affected parties bear any resemblance to the obstructionist actions of the United States in *Migratory Birds*, then the environmental benefits of the Citizen Submission Process must be viewed as theoretical only. Because the NAAEC is designed to promote cooperation and public participation with respect to the development and enforcement of environmental law,[51] the uncooperative nature of the U.S. approach has been discouraging.

Article 14(1)(e) requires a submitter to demonstrate that it has communicated in writing to the relevant authority its concern regarding a party's failure to effectively enforce environmental law. When the submitters in *Migratory Birds* wrote to the director of the Fish and Wildlife Service, they specifically stated that they viewed the failure to enforce the MBTA against loggers as a violation of U.S. duties under Article 5 of the NAAEC,[52] which calls on Parties to "effectively enforce its environmental laws and regulations through appropriate governmental action."[53] Submitters also allowed the Fish and Wildlife Service an opportunity to explain whether or not the nonenforcement policy remained in effect.[54] The United States never responded.

In addition, the U.S. response mischaracterized the submitters' allegations in *Migratory Birds.* The United States suggested that the submitters sought MBTA enforcement for habitat modification[55] despite the submitters making very clear that the submission related only to the direct taking of migratory birds.[56] One suspects that the United States

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51. NAAEC, *supra* note 1, art. 1, at 1483.

52. Letter from Chris Wold, Center for International Environmental Law, to Jamie Rappaport Clark, Director of U.S. Fish and Wildlife Service (Apr. 26, 1999) (on file with the Loyola of Los Angeles International & Comparative Law Review).

53. NAAEC, *supra* note 1, art. 5, at 1483-84.

54. Letter from Chris Wold, *supra* note 52.

55. *See, e.g.,* Response of the United States of America to the Submission made by the Alliance for the Wild Rockies, et al. under Article 14 of the North American Agreement on Environmental Cooperation, Migratory Birds, A14/SEM/99-002/04/RES (Feb. 29, 2000) (SEM 99-002), *available at* http://www.cec.org/files/pdf/sem/ACF1842.PDF [hereinafter Migratory Birds – Party Response] ("Targeting logging activities under the MBTA is not the most efficient, effective or satisfactory means of protection migratory birds. . . . [because] habitat modification *per se* is not prohibited by the MBTA.").

56. Submitters responded to the U.S. Response by stating:

> [W]e would like to emphasize once again that our request for an investigation relates to the failure to enforce the MBTA against loggers who *directly* kill and take protected migratory birds by killing fledglings and nestlings, crushing eggs, and destroying nests in violation of Section 703 of the MBTA. The United States, through the Fish and Wildlife Service (FWS), has two choices regarding enforcement of the MBTA against loggers. It can prosecute those who *directly* kill or take protected migratory birds under

believed it could quickly derail the submission by portraying it as the "spotted owl on steroids."[57]

Most significantly, the U.S. response never denied the basic allegation of the submitters' claim. Instead, it sought to justify its eighty-five year history of nonenforcement by suggesting that other nonenforcement related initiatives provided better protection to migratory birds than enforcement of the MBTA's take prohibition.[58] The U.S. response also sought to minimize the enormity of bird kills in logging operations by focusing on other problems facing migratory birds. It stated that power lines kill "thousands to tens of thousands" of birds nationwide and claimed that this toll is in "sharp contrast" to the bird take due to logging.[59] In fact, the uncontroverted evidence presented by the submitters indicates that the magnitude of direct takes from logging is greater than or equal to the threats, such as power lines, singled out by the U.S. Fish and Wildlife Service for prosecution. U.S. Forest Service records for the 1999 fiscal year show 302 timber sales of more than 2 million board feet and another 1,712 smaller sales of 301 to 2 million board feet.[60] The submitters' reference to an estimated 9,000 deaths from seven timber sales, again uncontroverted by the United States, suggests that the effect of the 302 largest sales is likely to be large and the effect of the 2,014 sales to be enormous.

At the same time, the burden on the Fish and Wildlife Service to enforce the law through the permitting of logging sales could be

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Section 703, or it can regulate their taking of migratory birds through permits, pursuant to Section 704 of the MBTA. It does neither.

Letter from Chris Wold and Stephen Porter, Center for International Environmental Law, to the CEC Secretariat, Commission for Environmental Cooperation 1-2 (Apr. 4, 2000) (on file with the Loyola of Los Angeles International & Comparative Law Review). This letter was never made part of the record.

57. Litigation over the spotted owl under the Endangered Species Act (ESA) has limited logging in the Pacific Northwest, the habitat of the owl, because logging results in habitat modification that indirectly "takes" spotted owls in violation of the ESA. *See* Babbitt v. Sweet Home Ch. of Communities for a Great Or., 515 U.S. 687 (1995). Whereas the ESA only restricts activities associated with threatened or endangered species, the MBTA applies its prohibition against "taking" to *all* migratory birds, not just those that are threatened or endangered. Unlike the ESA, however, the MBTA does not define "take" to include habitat modification as the ESA does. *See* MBTA, 16 U.S.C. § 703 (omitting the term "harm" from the list of activities constituting a take).

58. Migratory Birds – Party Response, *supra* note 55, at 12.

59. Migratory Birds – Party Response, *supra* note 55, at 6.

60. *See* USDA Forest Service, *Timber Sale Data by Region and State, at* http://www.fs.fed.us/forestmanagement/reports/saledata/index.shtml (last modified Sept. 15, 2003); USDA Forest Service, *Sold and Harvest Reports for All Convertible Products, at* http://www.fs.fed.us/forestmanagement/reports/sold-harvest/index.shtml (last modified Feb. 7, 2004) (authors' calculations based on statistics provided by the Forest Service).

relatively light compared to its existing scheme. According to the U.S. response, the U.S. Fish and Wildlife Service manages 40,000 active permits, processes about 13,000 intentional take permits annually, and in some unspecified fashion apparently provides for the annual permitting of some three million individuals to hunt migratory birds.[61] In that context, targeting a few large timber sales for MBTA enforcement might offer an efficient return on investment of enforcement resources.

Despite the obvious large-scale bird mortality in logging operations and the MBTA enforcement strategies suggested by the submitters,[62] the United States never sought to engage submitters in a constructive discussion about solutions to a vast failure to enforce an important environmental law. Moreover, although the factual record showed that the State of California found a way to implement a law similar to the MBTA through prohibitions against harming nests and nest trees, the creation of buffer zones around certain bird colonies or rookeries, and seasonal restrictions on logging,[63] the United States has done nothing to adopt or even discuss similar restrictions. If California can obtain criminal convictions in cases regarding logging operations, surely the federal government can do the same.

Under these circumstances, it can be safely assumed that the *Migratory Birds* submission has had no beneficial environmental result. At best, submitters obtained more detail about the "Petite Policy," the policy the United States uses to select cases for prosecution based on conduct involved in a prior state or federal proceeding.[64] Of course, the

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61. Migratory Birds – Party Response, *supra* note 55, at 11.

62. The submitters proposed that the United States use the Bird Conservation Plans prepared through the Partners in Flight program which place logging impacts in the broader context of the full range of impacts and species' needs. It also recommended seasonal restrictions on logging based on breeding behavior of migratory birds. Such restrictions would ensure that young birds could fledge before nests or eggs are destroyed by logging. Because most logging deaths occur during the breeding season, seasonal restrictions would substantially increase protections for migratory birds. The Fish and Wildlife Service even recommended such measures. Memorandum from the Acting Supervisor, Snake River Basin Office, to the Assistant Regional Director, Columbia River Ecosystem, Region 1, 5 (May 20, 1997) (recommending that the Forest Service include "timing and implementation requirements to protect migratory birds and their habitats"); Letter from Jennifer Fowler-Propst, Field Supervisor, United States Fish & Wildlife Services, to Kurt L. Winchester, District Ranger, United States Forest Service (on file with author) (recommending that logging operations should avoid nesting birds or "the Forest Service should wait until the young have fledged from the area or reschedule the project outside of the period of March through August").

63. Final Factual Record for Migratory Birds, *supra* note 46, at 44-46 (referring to the California Forest Practice Act and its implementing regulations).

64. *Id.* at 10 (describing the "Petite Policy").

submitters in *Migratory Birds* had little interest in the Petite Policy, because submitters wanted to understand why the United States had a nationwide policy, written or unwritten, of not investigating or enforcing violations of the MBTA involving nonendangered or nonthreatened species. That is, the submitters wanted information relating to conduct in violation of the MBTA that has *not* been subject to a prior state or federal proceeding.

IV. IMPACT OF THE COUNCIL'S ACTIONS

The manner in which the Council has narrowed the scope of factual records—by rejecting investigations of general policy failures—allows parties to disrupt the factual inquiry process, dictates where future claims will be brought, and sidesteps the Council's commitment to ensure that the JPAC and the public are involved in any process to amend the Article 14/15 Guidelines. While these consequences of the Council's and the United States' actions do not directly harm the environment, they have resulted in a loss of credibility in the Citizen Submission Process among U.S. environmental organizations. Since March 2000, no new submissions have been brought alleging that the United States is failing to enforce environmental law.

A. Derailment of the Factual Inquiry Process

Allowing the Council to narrow factual records to isolated examples enables governments to derail factual inquiries easily by asserting that those specific cases are the subject of ongoing proceedings or that they reflect a reasonable exercise of investigatory, prosecutorial, regulatory, or compliance discretion. For example, in *Oldman River II* the factual record certification and development process was slowed because the one case among many selected by the Council for review was the subject of a pending judicial proceeding.[65] In the future, a case with multiple appeals could be subject to significant delays in the factual record review process. Further, Article 45(3)(a) contemplates halting a factual inquiry for cases subject to judicial *or* administrative proceedings.[66] The definition of "administrative proceeding" encompasses a laundry list of terms, including the loose wording, "seeking an assurance of voluntary compliance."[67] Limiting

65. Council Res. 00-02, CEC, C/C.01/00-04/RES/02 (May 16, 2000), at http://www.cec.org/files/pdf/COUNCIL/00-02e_EN.pdf.

66. NAAEC, *supra* note 1, art. 45(3)(a), at 1495.

67. *Id.*

submissions to specific examples of nonenforcement, which could then be subject to such proceedings, could indefinitely bar important matters from being addressed.

In fact, events since *Oldman River II* prove that this concern is real. Canada initiated administrative actions identified in the *BC-Mining* submission *after* the submission was filed.[68] Because of Canada's action, the two mines were removed from consideration in the factual record.[69] The transparent nature of these sham administrative actions, however, is manifest; the two-year limitation under Canadian law to bring summary convictions had already expired and Canada failed to respond to this concern of submitters.[70] Moreover, a conservation group reports that Canada has made no progress to eliminate acid mine drainage at the Tulsequah mine, one of the mine sites eliminated from consideration due to Canada's administrative action.[71]

In addition, governments may inequitably employ Article 45(1)'s defenses for reasonable enforcement discretion and bona fide decisions to allocate resources to enforcement of other environmental matters. In practice, it is unquestionably easier to show such discretion when the scope of a factual record is limited to one or two illustrative cases, rather than a party's countrywide failure to enforce its environmental laws. Governments can almost always point to one example that is more, or equally, in need of resource allocation as another discrete example.[72] Allowing such defenses in the limited scope context, when

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68. *BC Mining* was submitted in June 1998. Sierra Club of British Columbia, et al., A Submission To The Commission On Environmental Cooperation Pursuant To Article 14 Of The North American Agreement On Environmental Cooperation, BC Mining, A14/SEM/98-004/01/SUB (June 1998) (SEM 98-004), *available at* http://www.cec.org/files/pdf/sem/98-4-SUB-E.pdf. Canada sent letters to the owners of the Mt. Washington mine, used as an example of Canada's widespread failure to enforce the Fisheries Act, on July 30, 1999. *See* Response Of The Government Of Canada To A Submission On Enforcement Matters Under Articles 14 And 15 Of The North American Agreement On Environmental Cooperation Submission at 22, BC Mining, SEM/98-004/06/RSP (Sept. 8, 1999) (SEM 98-004), *available at* http://www.cec.org/files/pdf/sem/98-4-RSP-E.pdf. On September 28, 1998, Canada sent a "warning letter" to the owner of the Tulsequah Chief Mine, also used by submitters to illustrate Canada's pattern of nonenforcement. Canada claimed that the warning letter constituted a "pending judicial or administrative proceeding." *Id.* at 5-6, 24.

69. Council Res. 01-11, CEC, C/C.01/01-06/RES/05/Final (Nov. 16, 2001), http://www.cec.org/files/PDF/COUNCIL/res01-11e.pdf.

70. ELI REPORT, *supra* note 47, at 17.

71. *Id.* (citing Letter from Transboundary Watershed Alliance to Joint Public Advisory Committee (Sept. 16, 2003)).

72. *Accord* Letter from Paul Kibel, Attorney at Fitzgerald, Abbott and Beardsley and Adjunct Professor, Golden State University School of Law, to JPAC, Comments to JPAC on CEC Council Actions Limiting Scope of Factual Records Prepared Pursuant to Articles 14 & 15 of NAAEC (Sept. 8, 2003) (on file with the Loyola of Los Angeles International & Comparative

they would not have been effective in a submitter's original claim of widespread enforcement failure, deflects party responsibility for enforcement of environmental law on a broad scale.

B. Targeting Mexico, Ignoring the United States

Limiting factual records to isolated, individualized instances will increase the relative number of submissions against Mexico and Canada by wiping out most of the claims for widespread noncompliance brought against the United States. Citizens and environmental groups in the United States often have recourse to citizen suit provisions through domestic law. They will pursue binding remedies in a court of law for the specific claims of government action or inaction of the type the Council suggests are necessary to meet the "sufficiency" or scoping tests. Broad, widespread policy failures, conversely, are not usually subject to citizen suits in the United States.[73] Thus, the Council may be cutting off the last practical avenue for citizens to allege that the United States is failing to effectively enforce its law by shutting the only window for evaluating widespread patterns of nonenforcement. The Citizen Submission Process may still be valuable for investigating nonenforcement of environmental law in Canada and Mexico, where some access to administrative bodies or courts for environmental harm exists but citizen suits are not featured as widely as in the United States. Evidence suggests that this tilt away from claims against the United States is already underway. As of March 5, 2004, seven of the eleven active claims involve Mexico; the other four involve Canada.[74]

C. Undermining the Usefulness of Factual Records

Eliminating widespread patterns of nonenforcement from the scope of factual records greatly reduces their usefulness. As described above in Section III(B)(2), case-specific failures to enforce do not address the issues presented by submitters and result in factual records

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Law Review) (stating that case-specific factual records "may be part of a programmatic policy of nonenforcement that cannot properly be characterized as reasonable exercises of prosecutorial discretion or bona fide enforcement allocation decisions").

73. Heckler v. Chaney, 470 U.S. 821, 832 (1985). In footnote 4, the Supreme Court said that in situations in which the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities . . . the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion.'" *Id.* at 833.

74. *See* CEC, *Current Status of Filed Submissions*, *available at* http://www.cec.org/citizen/status/index.cfm?varlan=english (last visited Apr. 21, 2004).

of far less benefit. For example, a factual record that explores the failure of the United States to enforce the MBTA over eighty-five years will result in a far different factual record than one investigating the failure of the United States to enforce two relatively minor violations of the MBTA. Similarly, a factual record that explores violations at one mine, as in *BC Mining*, offers much less information into the enforcement policies and practices of Canada than an inquiry into widespread failures to enforce at dozens of mines.

From an environmental perspective, case-specific factual records fail to tell the whole story of nonenforcement. A focus on two minor timber sales in *Migratory Birds* may yield some insight into enforcement practices, but an investigation of widespread patterns of nonenforcement for eighty-five years may yield important information concerning enforcement practices as well as the cumulative effect on bird populations from MBTA nonenforcement in all timber sales in a region. Similarly, submitters in *BC Logging* reported that their concerns with widespread patterns of nonenforcement would yield information about the cumulative impact of clear-cutting stream banks, individual stream crossings, and landslide prone areas.[75]

To overcome this problem, some have considered filing submissions with respect to dozens of specific violations within a single submission. This would be no great challenge with respect to timber sales in the United States. Many environmental impact statements for timber sales include statements from U.S. Fish and Wildlife officials acknowledging that logging the timber sale area will result in violations of the MBTA.[76] Of course, that only triggers the Council's second device to limit factual records–the claim of insufficient information. Before the Council decides that a submission lacks sufficient information to conduct a factual record, however, the Secretariat will have already invested significant resources in determining that the submission warrants a factual record. While this process does not directly produce negative environmental results, it wastes scarce resources of the Secretariat and the Commission that could be put to productive environmental purposes, such as investigating a country's failure to enforce environmental law.

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75. Letter from Randy L. Christensen, *supra* note 8.

76. *See, e.g.*, Memorandum from the Acting Supervisor, *supra* note 62; Letter from Jennifer Fowler-Propst, *supra* note 62.

D. Sidestepping the JPAC-Led Public Consultation Mechanism for Changing the Guidelines for Submissions on Enforcement Matters

The Council met in June 2000 amidst widespread concerns that the parties were engaged in backroom negotiations to revise the Guidelines in a manner that further restricted public access to the mechanism.[77] In particular, the Council was entertaining proposals to narrow the scope of factual records and to limit the Secretariat's fact gathering powers. Public concern over these potential revisions, as communicated by an energized JPAC, halted the discussions and led to Council Resolution 00-09.[78] The Resolution assured that the JPAC would play a central role in facilitating public input and formulating advice for any proposed guideline revisions.[79] The Resolution also permitted the JPAC to hold public consultations on the implementation and operation of the Citizen Submission Process.[80]

Since the adoption of Resolution 00-09, the Council has achieved some of the very rule changes under consideration in 2000 by simply narrowing the scope of factual records and by devising cramped definitions of terms like "sufficient information" in specific decisions. The Council is simply making an end-run around Resolution 00-09 by circumventing JPAC input and the JPAC–led public consultation procedure, thereby accomplishing the same objective in secret without providing its rationale or reasoning.

V. IMPROVING THE CITIZEN SUBMISSION PROCESS

Despite the serious concerns regarding the direction of the Citizen Submission Process, the process can be fixed. The history of the World Bank's Inspection Panel provides a compelling example of a process derailed and put back on its tracks. Whereas the discussion of the World Bank's Inspection Panel injects a ray of hope that the NAAEC's Citizen Submission process can recover, the recommendations that follow provide the practical tools for that recovery.

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77. These concerns were conveyed by JPAC, the NAC, and the NGO through advice and letters in addition to a lead editorial in the *Washington Post* that warned the NAFTA Parties against weakening the fragile but valuable Citizen Submission Process. *See How to Wreck Trade*, WASH. POST, June 10, 2000, at A22.

78. Council Res. 00-09, CEC, C/00-00/RES/09/REV. 2 (June 13, 2002), http://www.cec.org/files/pdf/council/00-09e_en.pdf.

79. *Id.*

80. *Id.*

A. Comparison with the World Bank Inspection Panel

The World Bank Inspection Panel (Panel) presents a helpful analogy to the NAAEC's Citizen Submission Process. The Panel and the CEC Secretariat both started operations in 1994.[81] The Panel responds to citizen requests for investigation of the failure of the World Bank Management to enforce its policies.[82] Quite frequently, these requests are based on actual or potential environmental destruction resulting from or threatened by a World Bank project. The Panel, like the Secretariat, determines the eligibility of a submitter's claim and decides whether to recommend an investigation. The World Bank Board of Executive Directors (Board), like the Council, then decides whether to approve the recommendation. The Panel investigates the situation and prepares a factual record. [83]

The strikingly similar processes have faced strikingly similar challenges. The Bank Management was often in close contact with the Board while the Panel was still determining eligibility. The Board often debated the substance of requests in the beginning stages of the process and narrowed the scope of investigations, sending the Panel back to get more information. In 1999, the World Bank recognized that those problems were "undermining the independence and authority of the Panel."[84] To a large extent, the resulting 1999 Clarifications rectified those problems. The Board reaffirmed the Panel's functions and independence by clearly stating that the Panel, not the Board, had the authority to judge the merits of a claimant's petition, including whether or not eligibility criteria had been met.[85] Now, the Board votes "yes" or

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81. Although the Inspection Panel was created in 1993, it did not begin operations until 1994. The World Bank Group, Overview, *at* http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WOverview/overview?opendocument (last visited Apr. 21, 2004). Website for the North American Agreement on Environmental Cooperation (Canadian Office), *at* http://www.naaec.gc.ca/eng/agreement/agreement_e.htm (last visited Apr. 21, 2004).

82. *See* Resolution Establishing the Inspection Panel, Res. No. IBRD 93-10, International Bank for Reconstruction and Development, ¶ 12 (Sept. 22, 1993), *available at* http://wbln0018.worldbank.org/IPN/ipnweb.nsf.

83. *Review of the Resolution Establishing the Inspection Panel: Clarification of Certain Aspects of the Resolution, in* THE WORLD BANK OPERATIONAL MANUAL, BANK PROCEDURES, BP 17.55—ann.B (Feb. 1997), *available at* http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf.

84. WORLD BANK INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK—THE INSPECTION PANEL 10 YEARS ON 32 (2003).

85. Conclusions of the Board's Second Review of the Inspection Panel, 1999 Clarifications, The Inspection Panel (Apr. 20, 1999), *available at* http://wbln0018.worldbank.org/IPN/ipnweb.nsf.

"no" on the development of a factual record, just as the clear language of the NAAEC allows the Council to do.

By delineating clear boundaries between the Panel and Board, the World Bank was able to restore legitimacy and confidence in their process and alleviate tension between the Board, the Panel, and citizens. Instead of constantly struggling with each other for power, each component now has a clearly specified role. From the World Bank's experience, the CEC can gain not only a model for its Citizen Submission Process, but also learn the lesson that institutional legitimacy is ultimately dependent upon public perception.

B. Recommendations to Improve the Citizen Submission Process

The steps that the Council must take to remedy the Citizen Submission Process are small, even if the implications of those small steps are large. Very sensible adjustments to the roles of the Secretariat and the Council, in particular, would regain the trust of environmental groups. Moreover, either the three Parties or the Council should authorize the preparation of recommendations to implement the underlying failures that emerge from the factual records.

1. Roles of the Secretariat and Council

Most important, the Council must relinquish its grip on the Citizen Submission Process. Whether in the NAAEC itself or in the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15, the governments must make clear that the Secretariat has the duty to make all the findings designated to it under Article 14 and 15. That is, the Guidelines must make clear, as the International Environmental Law Project, JPAC, and others have recommended, that the Secretariat has the sole authority to:

- determine if the submission meets the eligibility requirements, including if the submission includes "sufficient information," and
- determine the scope of the factual record, consistent with the information provided in the factual record, including broad patterns of nonenforcement conduct.[86]

On the other hand, the Guidelines must make clear that the Council has the authority to vote "yes" or "no" on the development of a factual record as recommended by the Secretariat and whether or not to make

86. INTERNATIONAL ENVIRONMENTAL LAW PROJECT, *supra* note 5.

the factual record public. The Council should not revise the Guidelines, remand submissions, or take any other action to narrow the definition of "sufficient information" to exclude broad patterns of nonenforcement conduct under NAAEC Article 14(1)(c).

2. Burden of Proof

Some commentators have suggested limiting the Council's authority to overrule a recommendation of the Secretariat based on an "arbitrary and capricious" standard of review from U.S. administrative law[87] or a "patently unreasonable" standard from Canadian administrative law.[88]

While a standard of review, even one that provides the Secretariat with discretion, appears appealing, it does not solve the problems currently facing the Citizen Submission Process. No one has criticized the Secretariat for making unreasonable or arbitrary decisions. Rather, the problem lies with the Council's strict control of the process. If the Council retains the authority to overrule the Secretariat when the Council wants or thinks the Secretariat has acted in an arbitrary or unreasonable way, control of the process still rests in the hands of the Council. If no institution exists to overrule the Council, then no progress has been achieved to control the unfettered exercise of power by the Council.

Given the universal acclaim for the opinions of the Secretariat, a better option is to sharply circumscribe the roles of the Secretariat and the Council as noted above. In the future, if scholarly and other non-party opinion suggests that the Secretariat is not effectuating its duties appropriately, then perhaps a discussion of a "standard of review" should ensue. It seems premature to take away the authority and discretion of the Secretariat when it has shown no inclination towards bias, much less abuse of its authority and discretion.

3. Role of Parties

The parties should be reminded of their role as stewards of the NAAEC and not solely as defendants in a fact-gathering process. Accordingly, the parties should treat the Citizen Submission Process as the collaborative process the drafters intended. Moreover, the JPAC noted that members of the Council appear to have a conflict of interest

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87. ELI REPORT, *supra* note 47, at 22 n.117 (referring to a suggestion from John Knox).

88. Jerry DeMarco, Sierra Legal Defence Fund, Re: Supplementary Written Comments Related to Articles 14 and 15 (Oct. 23, 2003) (on file with author).

because they cannot differentiate between their roles as both a member of the Council and as a party. The JPAC expressed its concern that "the influence of the Parties is being reflected in Council decisions."[89]

4. Transparency

The Council should fully implement Council Resolution 00-09, and thus begin respecting the JPAC's central role in consulting with the public and formulating advice to the Council on issues concerning the implementation and further elaboration of Articles 14 and 15. The JPAC again expressed its dismay that the Council continues to:

> [j]eopardize the commitment, expressed in Council Resolution 00-09, to increase transparency and public participation in the citizen submission process; and violate the object and purpose, or 'spirit' of Council Resolution 00-09, which as we'll all recall was a hard-fought compromise designed to allow the process to move forward and re-establish public confidence.[90]

5. Recommendations and Monitoring

The Process would benefit from some form of monitoring of governmental actions after the completion of the factual record. In *Migratory Birds*, for example, the factual record reported that "this factual record provides information regarding two alleged violations of the MBTA resulting from logging operations as to which the federal government took no enforcement action. These examples are consistent with the federal government's record to date of never having enforced the MBTA in regard to logging operations."[91]

Yet, the factual record was a dead end. Neither the Secretariat nor the Council suggested actions that the United States could undertake to implement the MBTA in light of the concerns of the submitters or the United States. Nor could submitters, the Secretariat, or the Council coerce the United States to enforce the MBTA. While recognizing that the Citizen Submission Process is designed to be collaborative, not coercive, a process for providing recommendations and monitoring implementation of those recommendations would contribute more meaningfully to the fulfillment of the NAAEC's objectives to improve enforcement policies and practices.

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89. JPAC, Advice to Council 03-05, *supra* note 12, at 3. That said, JPAC was not sure how to resolve this conflict of interest and will develop an opinion on how best to proceed. *Id.*

90. *Id.*

91. Final Factual Record for Migratory Birds, *supra* note 46, § 7, at 63.

Article 17.8.8 of the Dominican Republic-Central American-United States Free Trade Agreement (DR-CAFTA) improves on the NAAEC's Citizen Submission Process by requiring the DR-CAFTA Council to, "as appropriate, provide recommendations to the Environmental Cooperation Commission related to matters addressed in the factual record, including recommendations related to the further development of the Party's domestic mechanisms for monitoring its environmental enforcement."[92] DR-CAFTA takes steps towards using the factual record as part of an ongoing process to improve environmental enforcement or takes other steps to achieve environmental benefits from the Citizen Submission Process. Nonetheless, it does so to the exclusion of the submitters – those who originally brought the issues to the attention of the parties and the larger public. The CEC's Council, working with the Secretariat, JPAC, and interested citizens, should develop additional guidelines for adopting a scheme similar to DR-CAFTA's, but which also brings submitters into the process. Such a process may encourage the involved government to reevaluate, or as in the case of *Migratory Birds*, to evaluate for the first time, approaches to enforcement.[93]

VI. CONCLUSION

At its inception, the NAAEC's Citizen Submission Procedure was hailed as an innovative means of giving a voice to citizens concerned with the environment in the context of globalization and free trade. It has become a model for free trade agreements, with the Canada-Chile Free Trade Agreement and DR-CAFTA adopting similar processes.

Nonetheless, the mechanism has failed to fulfill its promise and it must be strengthened. To do so the Parties must avoid even the perception that they are restricting the ability of citizens to raise concerns about the effective enforcement of environmental law in North America. Environmental groups who have supported the development and implementation of the Citizen Submission Process are growing increasingly frustrated over the Council's unwillingness to respect the boundaries established in the process. If this perception continues, many of the groups who have supported and defended the Citizen Submission

92. Dominican Republic-Central American-United States Free Trade Agreement, (Aug. 5, 2004), art. 17.8.8, *at* http://www.ustr.gov/Trade_Agreements/Bilateral/DR-CAFTA/DR-CAFTA_FINAL_TEXTS/Section_Index.html.

93. David L. Markell, *Enhancing Citizen Involvement in Environmental Governance*, 18 NATURAL RESOURCES & ENV'T (forthcoming 2004) (draft on file with the Loyola of Los Angeles International & Comparative Law Review).

Process may simply abandon the process and declare it, and the CEC, inappropriately, tailored to meet the challenges of environmental enforcement. To the extent that other trade agreements adopt the NAAEC's process, those citizen submission processes will also be tarnished and discarded.

The spirit and letter of the NAAEC support the development of factual records on broad patterns of government conduct that may reveal systematic deficiencies in environmental enforcement. Conversely, narrowing factual inquiries to highly localized and specific acts or omissions will: (1) frustrate the objectives of the NAAEC by reducing the importance of the matters at issue; (2) focus inquiries on specific companies and enterprises, rather than on widespread government practices and conduct; and (3) enable governments to more easily derail factual inquiries by asserting that the matter is the subject of an ongoing judicial or administrative hearing or reflects a reasonable exercise of investigatory, prosecutorial, regulatory, or compliance discretion. In the end, such a limited process will fail to provide the full range of environmental benefits otherwise available through the Citizen Submission Process.

By modifying the scope of factual records and attempting to limit the kind of information the Secretariat can consider, the Council is calling for the preparation of factual records that no one, except the Council, wants. Surely the Citizen Submission Process was not designed to achieve this absurd outcome. The Council has also usurped the role of the Secretariat by attempting to constrain the definition of "sufficiency of information."

The Council certainly knows what it must do to restore public confidence in the process and to ensure its effectiveness. It must release its grip on the process and embrace the NAAEC's cooperative spirit. The question is whether it has the political will to do so.